IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0340

ROBERT HILTEN and LYNN HILTEN Appellants, vs. ROY BRAGG, Appellee.	)	**BRIEF OF APPELLANTS**

On Appeal from the Montana Twenty-Second Judicial District Court
Stillwater County, Cause No. DV 08-0025

APPEARANCES

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STATEMENT OF ISSUES

Appellants state the issues as follows:

Was the Hilten's defamation suit for the statement that Bob is a "pathological liar warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law?

Have the Hiltens personally engaged in sanctionable conduct, or is their attorney the actual responsible party?

Are the sanctions reasonable?

STATEMENT OF THE CASE

This is an appeal from a District Court order in which Plaintiffs were ordered to pay Defendant's attorney fees in the amount of $46,182.92 as sanction under Rule 11, and their attorney ordered to pay none. The seeds of this lawsuit were sown from a dispute between two neighbors who have locked horns over property rights, subdivision covenants, and especially over a cellular phone tower located within the Eagle Mountain Subdivision near Columbus, Montana. The Hiltens originally purchased their property in 1990. Bragg moved into the subdivision in 2004, and soon thereafter began a vocal campaign against a lawsuit to remove the cellular phone tower that had been in litigation before his arrival. Hostilities escalated as the lawsuit lingered on without resolution.

This Court is certainly aware how deeply the passions run when neighbors have land-use disputes. For those who claim ownership to a piece of the "Last Best Place," the question of the proper stewardship of that land can be like the question of which religion is correct. Sometimes the neighbors who have these disagreements are able to discuss - if not resolve - their differences of opinion. It might not have originated here, but "agreeing to disagree" is a time-honored practice in this state.

Sometimes, however, the disagreement becomes secondary. Sometimes an attack on a man's position becomes an attack on the man himself. In this particular case, Defendant Roy Bragg accused Bob Hilten, a military veteran and professional airline pilot, of being a "pathological liar," in public, in front of his peers. It is one thing for a person to say they do not believe what another person says. It is quite another to label that man a liar, and not just any liar, a pathological liar. It implies mental illness. It deprives him of his personal integrity. No one would question that being labeled a "pathological liar" is opprobrious, and deeply offensive. No one would question the fundamental impulse to protect one's good name. Writers have spoken of the sanctity of reputation:

> Good name in man and woman, dear my lord, Is the immediate jewel of their souls. Who steals my purse steals trash; 'Tis something, nothin; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.

Milkovich v. Lorain Journal Co., et al, 497 U.S. 1, 12 (1990) (quoting Shakespeare's *Othello,* Act III, scene 3).

Any man has a right to object when he is labeled a "pathological liar." He has a right to take offense, and he is reasonable to consult with a lawyer to ask what he can do about it. He is reasonable to ask the lawyer about filing a lawsuit. But who is responsible for whether that lawsuit is put into the court system, and the form it takes when it gets there?

Is it the lay client, uneducated in the law, who seeks professional advice, and relies on his attorney's professional opinion?

Or is it the lawyer who agrees to pursue the lawsuit, who accepts payment to do so, who drafts the complaint, who serves the discovery, who moves for extensions of time, who files the briefs and affidavits - until it becomes clear she has lead her clients into very dire circumstances, at which point she ceases the representation and secures her own attorney?

The District Court found that the circumstances surrounding this lawsuit demonstrated it was an improper lawsuit. The Hiltens' lawyer was aware of these circumstances, and told her clients to charge forward. Should that lawyer still be absolved of all responsibility, leaving a $46,000 liability at the feet of her clients? Should the clients be punished for relying on their lawyer? These are the questions this Court is called upon to answer.

STATEMENT OF THE FACTS

Attorney Penelope Strong filed a complaint on behalf of Plaintiffs, seeking damages for allegedly defamatory statements made by Defendant Bragg. The complaint was filed on March 18, 2008, and Bragg was served soon thereafter. Bragg retained attorney Singer and answered on May 21, 2008. Both sides exchanged written discovery before Defendant filed his motion for summary judgment on February 5, 2009. Defendant's summary judgment motion did not make any reference to Rule 11 sanctions. The District Court's May 8 order granting summary judgment similarly omitted any mention of the possibility of sanctions.

The District Court's summary judgment order found that the Hiltens' claims were legally flawed, and unable to overcome the significant legal hurdles which exist for any defamation Plaintiff. Among other grounds the District Court cited for dismissing the case were the following:

- As a matter of defamation law, the alleged defamatory statements were incapable of bearing a defamatory meaning;
- As to Lynn's claims, none of the allegedly defamatory statements named her personally
- As a matter of defamation law, five of the six alleged defamatory statements were "constitutionally protected statements of opinion."

- As a matter of defamation law, the alleged defamatory statements were privileged under §27-1-804(2) because they were made during the course of open meetings of a homeowner's association, which the District Court took to be an official proceeding
- As a matter of defamation law, Bob Hilten is a "public figure."

The District Court also supported its dismissal with a finding that Bragg had a defense of "truth" with respect to the claim of defamation for his statement that Bob Hilten was a pathological liar. The District Court found that it was the "truth" that Hilten was a pathological liar based on two statements Bob made at a homeowners association meeting. It stated:

> Bragg purports in his statement of uncontested facts, and Hilten does not deny, that Robert Hilten said in the same September 30, 2007 meeting that Bragg sent a letter to the board threatening to sue the ALLTEL tower litigation. Additionally, Robert Hilten stated at the September 30, 2007, quarterly meeting that the board did not request attorney's fees as part of the settlement. According to Bragg, and not disputed by Robert Hilten, the board did not request attorney's fees as part of the settlement. Truth is a defense to any claim for defamation. Sections 27-1-802 and 27-1-803.

Order Granting Summary Judgment, p. 10.

A week after Plaintiffs' case was dismissed on summary judgment, Defendant moved for "sanctions pursuant to Rules 11 and 37(c)-(d)." Defendant requested sanctions claiming that the Hiltens' suit was frivolous, and also sought sanctions for new allegations of discovery abuses. Even though Plaintiffs'

discovery responses had been produced nine months earlier, in August 2008, Defendant only now saw fit to raise his contention that the Hiltens had engaged in "bad faith...discovery tactics" by altering audio recordings. Defendant also sought sanctions for Plaintiffs' failure to admit the absence of monetary damages, and for a factual inaccuracy in an affidavit submitted in opposition to summary judgment.

It is clear that the Hiltens' complaint was factually correct, as Bragg has admitted making each of the statements alleged in this defamation action. Nevertheless, Defendant argued and the District Court agreed that the Hiltens should be sanctioned for filing a lawsuit that had "no basis" in fact. In reality, Bragg's arguments for sanctions were thinly supported by the facts, or not at all.

Prior to the December 18, 2009 hearing on Defendant's sanctions motion, Bragg took the position that Hilten lied when he stated that Bragg had made threats to sue the association. At the hearing on sanctions, however, he admitted that he had communicated a threat to sue in a letter he wrote to Lance Lovell, the attorney for the Eagle Mountain Landowner's Association:

> Q: (By Mr. Gillispie) Mr. Bragg, are you threatening a lawsuit with that paragraph 3?
> A: To whom?
> Q: I don't know to whom. Are you threatening a lawsuit with that – in that paragraph?
> A: I was threatening to, at that point, with an issue I had with individual landowners that were in violation of the covenants, not the homeowners association, and not any of the board members.
> Q: Who does Mr. Lovell represent?
> A: He represents whoever it is that pays him.

(Transcript of December 18, 2009 proceedings, pp 67 - 68)

The testimony on the alteration of the audio files was inconclusive. Defendant's witness Duane Hons stated he could not form a conclusion as to whether there had been intentional alteration of the recordings:

> A: [. . .] So based on that, I would say, single WAV file, he didn't have parts missing when he put it on his computer. If it became missing at other times, I've given you a number of ways I could see that happening. Intentional? Not intentional? I can't say. [. . .]

(Transcript of December 18, 2009 proceedings, p. 31)

Based on Hons testimony, the Court identified three possible causes for the missing information, all of which required active intent to alter the audio files - "deliberate editing either before or after the transfer, playing the file to be recorded onto a cassette tape and then transferring the information back to a digital file, or the stopping and starting of the recorder during the original recording." (Findings ¶60) It did not mention a fourth scenario to which Hons testified that suggested an innocent explanation, which is that the information could have been lost when transferring between file formats. Hons testified:

> Q: Can information be lost with an imperfect conversion from a WAV format to an MP3 format?
> A: Could be. I would – I would see that as a possibility
> Q: And is it possible that that resultant MP3 file might still play?
> A: Yeah. I would say in a – in a – if you just set the scenario, you have a WAV file in Nero or any other editor, and you try to convert that, that it doesn't convert some portion of it correctly,

> especially if it's one of the hundreds of free ware ones. And could it potentially play? I would say so.

Testimony was also heard at the hearing on sanctions regarding Lynn Hilten's affidavit, which had been drafted and submitted by their attorney Penelope Strong to support their response to the Defendant's motion for summary judgment. This affidavit contained an incorrect statement that appeared to indicate Lynn Hilten had been at a homeowner's association meeting, when she had in fact only heard a recording of that meeting. Lynn testified that she had asked attorney Strong to remove this statement, that Strong had agreed to, but did not do so. (Transcript of December 18, 2009 proceedings, pp 191-92). Attorney Strong testified that she believed the incorrect statement was the result of her oversight. (*Id.*, pp 132, 146)

In granting the Defendant's motion, the District Court found that the Hiltens claims were all frivolous, and that their attorney did not have a reasonable argument for why she advanced those claims. It found that Rule 26 was violated when that attorney requested irrelevant discovery. Nevertheless, the District Court declined to impose even $1 of sanctions against that attorney. It did sanction the Hiltens $46,182.92, which represented all the attorneys fees Defendant claimed to have incurred in these proceedings.

The Hiltens have appealed the District Court's determination that their complaint violated Rule 11, and also seek review of the amount and apportionment of those sanctions.

STANDARD OF REVIEW

Appellate Review in Rule 11 cases

This court applies a mixed standard of review in Rule 11 cases:

> [W]e review de novo the district court's determination that the pleading, motion or other paper violates Rule 11. We review the district court's findings of fact underlying that conclusion to determine whether such findings are clearly erroneous. If the court determines that Rule 11 was violated, then we review the district court's choice of sanction for abuse of discretion.

Good Schools Missoula v. Missoula County Public School District, 344 Mont. 374, 2008 MT 231, ¶ 16.

All three standards of review apply in this case. First, the Hiltens challenge the District Court's finding that their complaint violated Rule 11 because it had no "basis in law or fact and with no reasonable argument for the extension of the law." This Court will independently review whether it agrees that the complaint violates Rule 11. The clearly erroneous standard applies with respect to the District Court's findings that Bob and Lynn misrepresented facts in the litigation, and the District Court's finding of fact that Bob Hilten is a "pathological liar." Finally, the Hiltens' challenge to the amount and apportionment of sanctions will be reviewed under an abuse of discretion standard.

Rule 11 standard

Rule 11, M.R.Civ.P. currently reads as follows:

> **Rule 11. Signing of pleadings, motions, and other papers -- sanctions.** Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Though the District Court stated as a Conclusion of Law that "Montana's Rule 11 is very similar to Federal Rule of Procedure 11", there are in fact important differences.

One difference is that the federal rule states:

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates

> Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. (Rule 11(c)(2), F.R.Civ.P.)

Though the Federal Rule was amended in 1993 to include this language, Defendant claimed in its briefing on sanctions that "there is no authority (either outside Montana or within) that supports Plaintiffs theory that a defendant must threaten sanctions at the outset of the case and outline for the plaintiff the reasons their complaint is legally insufficient . . . A rule like that would eviscerate Rule 11 [. . .]" Reply Brief on Sanctions, p. 14.

Interestingly, this very Court seems prepared to so "eviscerate" Rule 11 and is currently accepting comments on whether Montana's Rule 11 (and other Rules of Civil Procedure) should be amended to more closely resemble the federal rule. See, March 3, 2010 Order, *In the Matter of Proposed Revisions to the Montana Rules of Civil Procedure*, AF 07-157.

The federal rule and Montana's proposed amended Rule 11 also contain other important differences, including that it forbids a court from imposing monetary sanctions against a represented party where the basis of the violation is that the claims are not "warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing law or for establishing new law." Rule 11(c)(5)(A), F.R.Civ.P/Proposed M.R.Civ.P amendment. The federal rule and the

Montana's proposed amendment also explicitly state that Rule 11 does not apply to "disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37."

ARGUMENT

I. THE HILTENS' LAWSUIT IS NOT SANCTIONABLE BECAUSE IT MAY BE SUPPORTED BY THE EXISTING LAW, OR A GOOD FAITH ARGUMENT FOR THE EXTENSION OF THAT LAW

A. Stating that someone is "pathological liar" can give rise to a cause of action in defamation under Montana law.

Montana law defines certain statements as being so plainly offensive that the harm they cause is presumed; the plaintiff need not present any evidence of specific damages because the statement is defamatory "per se." The accusation that somebody is a "pathological liar" is defamatory per se.

Slander is defined in the Montana code:

> **27-1-803. Slander defined.** Slander is a false and unprivileged publication other than libel that:
> (1) charges any person with crime or with having been indicted, convicted, or punished for crime;
> (2) imputes in a person the present existence of an infectious, contagious, or loathsome disease;
> (3) tends directly to injure a person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualification in those respects that the office or other occupation peculiarly requires or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profit;

(4) imputes to a person impotence or want of chastity; or
(5) by natural consequence causes actual damage

The statement that a person is a "pathological liar" meets at least two of these definitions. First, it "imputes in a person the present existence of an infectious, contagious, or loathsome disease" because the "pathological" imputes the existence of a mental disease. The dictionary definition of "pathological" demonstrates that it imputes mental disease:

1. Of or relating to pathology,
2. Altered or caused by disease *also*: indicative of disease
3. Being such to a degree that is extreme, excessive or markedly abnormal

Merriam-Webster Online Dictionary, http://www.merriam-webster.com/, last accessed July 6, 2010.

"Pathological liar" also meets the fourth definition of slander because it imputes a "want of chastity." "Chastity" has at least two definitions:

1. The quality or state of being chaste: as abstention from unlawful sexual intercourse b : abstention from all sexual intercourse c: purity in conduct and intention d: restraint and simplicity in design or expression
2. personal integrity

Merriam-Webster Online Dictionary, http://www.merriam-webster.com/, last accessed July 6, 2010.

There would seem to be little disagreement that the accusation that a person is a "pathological liar" is an attack on that person's personal integrity. As the target of the statement that he is a "pathological liar," Hilten had a cause of action for

defamation. There is no question that Bragg made this statement. Accordingly the lawsuit was supported by law and fact, and was not sanctionable. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986) ("We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the 'well grounded in fact and warranted by existing law' clause of the rule.")

B. Bragg's statement was not protected as one made in an "official proceeding" because the meeting of a homeowners' association is not an "official proceeding" for purposes of §27-1-804(2), MCA.

Statements made in a "legislative or judicial proceeding or in any other official proceeding authorized by law" are privileged under Montana law, regardless of the defamatory content of the statement . §27-1-804(2), MCA. Defendant argued, and the District Court agreed, that Bragg's statement that Hilten was a pathological liar was privileged as one made in an official proceeding because it was made during a homeowner's association meeting.

The District Court concluded that these meetings were official proceedings on the authority of a California case, *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 471 (Cal. App. 2000). This case dealt with whether statements made at a homeowners' association meeting and in an association newsletter

occurred in a "public forum." *Damon* did not address whether such statements occurred in the context of an "official proceeding."

The California cases which deal with "official proceedings" instead of "public forums" seem to indicate that the board meetings are not "official proceedings" for at least one reason, which is that the board's decisions are not judicially reviewable by a writ of mandate. Cf. *Kibler v. No. Inyo County Local Hospital District*, 46 Cal.Rptr.3d 41, 46, 46 Cal. 4th 192, 138 P.3d 193 (Cal. 2006) ("There is another attribute of hospital peer review that supports our conclusion that peer review constitutes an 'official proceeding' under the anti-SLAPP law. A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate.")

California courts have held that an official proceeding is "not a meeting of a board of directors of a nonprofit corporation or the like." *Hackethal v. Weissbein*, 24 Cal. 3d 55, 59-60, 592 P. 2d 1175 (Cal. 1979). The Eagle Mountain Landowners Association is a nonprofit corporation, that was holding a meeting when Bragg made his statement that Hilten is a "pathological liar." The statement was not one made in an official proceeding.

Regardless of how this Court would come out on the "official proceeding" issue, it is apparent that there are good faith arguments for why the homeowners' association meeting was not an official proceeding. It is not so obvious that

Bragg's statement was privileged as one made in an official proceeding that no reasonable lawyer could pursue a defamation action for statements made in that setting. Though this Court will review de novo the question of whether the Hilten's complaint was frivolous it is worth noting that the District Court was presented with reasonable arguments supporting the slander claim that it left unaddressed. These arguments appeared in Plaintiffs' January 21st, 2010 Proposed Findings of Fact and Conclusions of Law:

> 16. Though Plaintiffs reiterate that they are not liable for whether their attorney has pursued unfounded legal theories based on accurate facts, they contest Defendant Bragg's position that their litigation is wholly frivolous.
> 17. Specifically, the *Damon v. Ocean Hills Journalism Club* case does not stand for the proposition that a homeowner's association meeting is an "official proceeding", but rather that it is a "public forum".
> 18. The California anti-SLAPP statute on which the *Damon* case is based provides protections for four different categories of statements, including discrete categories for statements made in official proceedings *and* statements made in a public forum. The exact language is as follows:
>
> (e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:
>
> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
> (3) any written or oral statement or writing made in a

> place open to the public or a public forum in connection with an issue of public interest;
> (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

19. Similar to subsection (e)(2) of the above-quoted statute, Montana law protects statements made in an official proceeding.
20. Montana law contains no analogous protection for statements made in a public forum similar to the protection found at (e)(3) of the California anti-SLAPP statute.
21. The *Damon* case clearly implicated subsection (e)(3) of the California anti-SLAPP statute, not (e)(2). That court stated:

> [W]e hold the trial court properly determined the anti-SLAPP statute applied because the evidence showed the alleged defamatory statements were made "in a place open to the public or in a public forum" and concerned "an issue of public interest" within the meaning of Code of Civil Procedure section 425.16, subdivision (e)(3)

85 Cal. App. 4th, 468, 472 (2000).

22. California cases which define “official proceeding” typically require the individuals involved to act in the capacity of government officials performing an official duty and also that the proceedings be reviewable by writ of mandate. *See Olaes v. Nationwide Mut. Ins. Co.* 135 Cal App. 4th 1501, 1508 (2006). Neither characteristic is present with respect to the EMLA meetings at issue.
22. Plaintiffs have appealed this Court’s order granting summary judgment in good faith and though this Court obviously comes out the other way on the privilege issue it recognizes that there is a legitimate difference of opinion between the positions taken by Plaintiffs’ and Defense counsel, and that there is no clear Montana Supreme Court authority on this specific privilege issue.
23. It has not been made to appear in the record that all legal theories pursued by Plaintiffs were so lacking in legal authority as to warrant the imposition of Rule 11 sanctions, as “to avoid sanctions under Rule 11 it is not necessary that a party be correct in their view of the law. The party need only make a good faith argument for their view of the law.” *Adoption of R.D.T*, 239 Mont. 33, 36,

778 P.2d 416 (citing *Zaldivar v. City of Los Angeles* 780 F.2d 823, 830-31 (9th Cir. 1986).

The District Court's Findings of Fact and Conclusions of Law did not address the above-argument in any manner, but simply recited that Bragg's "pathological liar" statement was "privileged both as opinion and as a statement made in an official proceeding" and that the Hiltens' slander claim was made "without any basis in law or fact and with no reasonable argument for the extension of the law."

Plaintiffs contend the District Court erred in finding that there was no reasonable argument for the extension of the law on official proceedings privileges because the law is neither settled nor definitive as to whether this privilege attaches to a homeowner's association meeting, as indeed it appears that it does not. Even if Bragg's statement was clearly privileged as a statement made in an official proceeding, it is not clear why the clients have been sanctioned for failing to appreciate the scope of the official proceedings privilege, whereas their attorney has not been sanctioned for taking an unsupportable legal position.

II. SANCTIONS ARE NOT WARRANTED BECAUSE THE HILTENS WERE IN GOOD FAITH IN THEIR FACTUAL REPRESENTATIONS

A. Bob Hilten is not a pathological liar

The District Court declared as a finding of fact that "Both Hiltens violated Rule 11 in bringing the claim based on the 'pathological liar' statement because

both Hiltens knew it was not an untrue statement." In essence, the District Court made a finding of fact that Bob Hilten is a liar, and not just any liar – a pathological liar. This finding was clearly erroneous.

No mental health professional has found Bob has any mental abnormality or marked inability to tell the truth. There is no evidence that he has ever been charged with or convicted of a crime that would reflect on his character for telling the truth. The facts he provided to his attorney out of which she drafted the complaint were all correct. In fact, the only basis to even suggest Bob Hilten is a pathological liar comes from two statements he made at a single homeowner's association meeting – one, that Bragg had threatened to sue the association, and two, that that the board had not requested attorney fees in the settlement offer made to Alltel.

Bob is not a pathological liar for saying that Roy Bragg threatened to sue the association because Roy Bragg did threaten to sue the association. He admitted to this at the hearing on sanctions:

> Q: And did you ever threaten to sue the association?
> A: No, not for that.
> Q: What did you threaten to sue the association for?
> A: I'd have to go back and look. I actually never threatened the association directly. I never said I will sue you if you blah, blah.

Transcript of December 18, 2009 proceedings, page 65.

He also testified:

Q: Okay. And you've admitted this is a threat you communicated to Mr. Lovell to sue?
A: Yeah, I thought that I might bring a suit against those homeowners that were violating covenants.
Q: And so you stated that the – Mr. Hilten accusing you of threatening to sue the association was part of the basis for your statement that Hilten is a pathological liar?
A: That is correct.
Q: But here we have a letter that says-
A: No, see, that does not say I'm going to sue the homeowner's association or the board members.
Q: Okay.
A: My intent was to sue the people that were in violation of the covenants. And if you look at the covenant, it actually says in there that a homeowner has the right to bring a suit against another homeowner for violation of the covenants and that it does not have to be brought by the homeowner's association or the board of directors.

It is immaterial whether Bragg was threatening a lawsuit against individual homeowners, or against the entire association. From Bob's perspective, what he had was a letter from Roy Bragg, sent to the association attorney, threatening litigation. Maybe Bob misunderstood what Bragg was saying in the letter, or maybe Bragg did indeed threaten to sue the association – and not just his neighbors. Either way, a person is not a pathological liar just because they do not appreciate the nuances of another person's threat to file a lawsuit.

Though it is true that Bob stated at the Sep 29, 2007 meeting that the board had not requested reimbursement of the attorneys fees, and it is also true that the board, in fact, had requested such reimbursement, this does not mean that Bob was lying about the issue – it simply indicates that he misstated facts. Facts can be

misstated for any of a number of reasons – sometimes it is because that person is lying, however other times it is simply because that person is relying on erroneous information.

The documentary evidence proves that though Bob participated in some of the discussions between board attorney Lance Lovell and Alltel attorney Tim Fox regarding the terms of the settlement offer to Alltel, he did not participate in the board's decision-making process when it communicated a written offer of settlement to Mr. Fox in April of 2007. This letter stated, in relevant part, that "Bob has recused himself from participating in the Board's decisions regarding possible settlement of the litigation."

At the September 29, 2007 meeting, Bob read from a document that he believed was the settlement offer that had been conveyed to Alltel. This is reflected in the October 15, 2007 letter he sent apologizing for the misinformation, where he states "At the meeting I read what I thought was the final draft of that offer and it was not." (Exhibit 17 for Defendant's Motion for Summary Judgment) Bob testified at the hearing on sanctions that ". . . I had recused myself, I made no meetings with the attorney or anything concerning this or the outcome or how it was presented at that point ". (Transcript of December 18, 2009 Proceedings, pp 164-166)

Bob Hilten is not a pathological liar, nor is it reasonable to expect him to believe that it was "not an untrue statement" when he was called one. He should not be sanctioned for denying that he is a pathological liar. If “pathological liar” means anything, it means something more than misstating facts on one single occasion. Bob is not a pathological liar, and it was clearly erroneous for the District Court to find he was.

B. Lynn Hilten's conduct was not sanctionable because she was not ultimately responsible for the contents of the affidavit, and her attorney has acknowledged it was her own oversight.

The Hiltens regret that a misleading affidavit was filed with the District Court. That stated, there is only one reasonable conclusion as to why this affidavit still had the incorrect statement in it at the time it was filed with the Court, and that is that the attorney failed to make the correction when asked. Many facts in the record support this conclusion, but none more so than the attorney’s own admission that it was her oversight:

> Q: Was there any intent to present a false statement to the Court in conjunction with this summary judgment motion and response – or opposition?
> A: There was not. And I do regret that an inaccurate statement went in, because subsequently I learned that she indeed was not at the meeting, when, in fact, in her affidavit she stated that she was.
> Q: Was that an oversight?
> A: I believe it was.

Transcript of December 18, 2009 proceedings, p. 132 (see also pp 145-46, 191-95)

III. THE SANCTIONS WERE UNREASONABLE

A. The sanctions under the discovery rules were not appropriate under the circumstances, particularly given the lack of prejudice to Defendant resulting from the alleged violations.

The sanctions under Rule 37 and Rule 26 are not warranted because they were not timely. Courts have noted that the principle aim of sanctions is deterrence. As noted by the Ninth Circuit, "[I]f the purposes of the rules are to be served, the sanctionable behavior should be brought to the immediate attention of the offending attorney." *Yagman v. Brown*, 796 F.2d 1165, 1183 (9th Cir. 1986). Doing serves the "paramount aim of deterrence and, simultaneously, eliminates the danger of an unsuspected punitive award. *Id.* As imposed by the District Court, the sanctions in this case served precisely the opposite objectives - they failed to prevent costly litigation and were imposed in the form of an unsuspected punitive award.

Further, the District Court's sanctions award for the discovery abuses appears to exceed the allowable sanction for a violations of Rules 26 and 37. These rules limit the allowable sanction to the “reasonable expenses incurred” due to the violation of the . Here, there is no finding as to what those reasonable expenses were. Therefore it is difficult to determine the reasonableness of any

sanctions awarded for discovery abuses. It is simply implausible that Plaintiffs' discovery conduct cost Defendant $46,000.

Finally, even if the discovery conduct is sanctionable, the Hiltens are not the proper party to bear the sanctions. The District Court expected them to know whether Rule 26 would allow them to request information outside of the scope of the defamation action, but did not hold their attorney to the same standard. It sanctioned them for denying the requested admission on monetary damages, but not attorney Strong who actually signed that response. It was attorney Strong, not Lynn, who failed to remove the inaccurate statement from the affidavit when asked. The District Court may well have acted within its discretion in imposing discovery sanctions, but it was not within its discretion to insulate the attorney who was an active participant in those abuses.

B. The sanctions are not reasonable given the lack of notice to Plaintiff and absence of any evidence that Defendant sought to mitigate his damages.

Sanctions should be set at the minimum to deter litigation misconduct, not the maximum amount that could be awarded. See *White v. General Motors Inc.*, 908 F.2d 675, 685 (10th Cir. 1990) ("We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the minimum that will serve to adequately deter the undesirable behavior.") In awarding sanctions, "The measure

to be used is not actual expenses and fees but those the court determines to be reasonable. Implicit in this is the duty to mitigate." *Matter of Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986) (citation omitted).

At no point did Defendant ever seek a voluntary dismissal of the action. At no point in the nine months between receiving the audio recordings and filing its motion for sanctions did Defendant even indicate there were problems with the recordings, which he had independent copies of anyway. Defendant also never gave any indication to Plaintiffs that sanctions would be pursued, at least, not until it had already obtained a judgment in its favor. The sanctions are not reasonable because they fail to account for the Defendant's failure to take any action that might have prevented him from incurring additional attorneys fees.

C. The sanctions are not reasonable because it holds the Hiltens to a higher standard of legal knowledge than their own attorney.

It is unreasonable to sanction the Hiltens in an amount of $46,000 for not knowing the distinction between *per quod* and *per se* defamation. It is unreasonable to sanction the Hiltens $46,000 for their attorney submitting an affidavit with a statement that the clients had asked to be removed. It is unreasonable to sanction the Hiltens $46,000 for requesting irrelevant information in discovery when it was their attorney who drafted and served the discovery and who approved of the requests.

The attorney is the "signer of the pleadings", and as such must bear *some* responsibility for the pleadings she signs - that is why Rule 11 designates the attorney's signature as a "certificate by the signer" that the pleading, motion or paper is in good faith. The District Court gave a complete pass to the attorney that had led the Hiltens into this situation, and then abandoned the clients once her personal interests were placed in jeopardy.

At a minimum, the District Court's award of sanctions is plainly inconsistent with its conclusion of law that "Unfounded legal theories are charged against the attorney, while the party is obligated to make a reasonable inquiry under the circumstances that the factual allegations asserted are true." (Conclusions of Law, ¶ 7) The Hiltens accurately represented the facts to their attorney, and she advised them to pursue an action for defamation. They should not be sanctioned for the legal theories their attorney advanced in that action.

The District Court looked at the facts and circumstances of the lawsuit, and concluded it should not have been brought. Attorney Strong looked at the same facts and circumstances and concluded it should be brought. As a matter of policy, Rule 11 should not punish a client who accepted the second determination over the first. Of course the client will believe they have a legitimate case. If the legal barriers - privileges, heightened burdens of proof, the distinction between per se and per quod defamation - were insurmountable, or factual issues clouding the

contemplated lawsuit made it ill-advised, no one could have known it better than the attorney advising the client.

CONCLUSION AND RELIEF SOUGHT

The Hiltens met with an attorney to see what they could do about a situation with a neighbor. The neighbor had called one of them a pathological liar, to which they both took deep offense – as any self-respecting individual would. In other times, this sort of dispute would be settled at the crack of dawn, winner take all. The Hiltens did not take that route. Instead they asked the law to right their wrong. In doing so they were punished – severely – for having come into Montana's courts at all.

There are some lawsuits that, though meritorious, perhaps should not be brought after all. Perhaps this is even one of them. But who stands in the best position to make that judgment to whether litigation should go forward? Is it the client, with no knowledge of the legal process, who is in the thick of the situation that brought him to the lawyer in the first place? Or is it the lawyer who has the benefit of having an outsider's perspective and knowledge of the law?

A reversal of the sanctions in their entirety is appropriate, because their lawsuit was reasonably supportable in law and fact, which this Court will determine on a de novo basis. However, if it is this Court's opinion that sanctions are warranted under any of the Rules of Civil Procedure, the Hiltens seek an order

remanding the District Court's decision for reconsideration of the amount of the sanctions, with direction to the District Court that such sanctions should be imposed against attorney Strong to the extent her conduct facilitated the violations of the rules.

Respectfully submitted this ___ day of July, 2010

GILLISPIE LAW OFFICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Civil Procedure, I certify that this Brief is printed with a proportionally spaced Times New Roman text typefact of 14 points, is double spaced, and that it contains 7,154 words as calculated by Microsoft Word 2007, excluding this Certificate of Compliance and the Certificate of Service.

DATED this ___ day of July, 2010

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Daniel G. Gillispie

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies upon the following individuals via USPS first class mail at the following addresses:

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